

being contrary to the equal opportunity provisions of the Hong Kong Bill of Rights Ordinance remains to be seen.<sup>54</sup>

Security of tenure of course has its trade-off. Under the University's terms of employment, staff are subject to many important terms which may be varied unilaterally. While no doubt the Council is mindful to exercise its power with discretion, the far-reaching policy changes which are already affecting recruitment and employment during the run-up to 1997 may well give rise to the Council making decisions it has not been required to make in the past. The fact that such regulations can be made with the minimum of formality and supervision should be cause for concern.

Other issues although not specifically raised in the case remain outstanding. The demarcation of what activities are within the private as opposed to the public domain of a public body remain far from certain. Although the issue of public versus private law did not arise during the course of the trial, one might be forgiven for wondering on what policy basis university lecturers have been granted virtually automatic access to such wide-ranging public law remedies to resolve their contractual disputes with their employers. By contrast, employees in other tertiary institutions and the private sector have no such redress.

*Michael J Downey*

### Mandatory Repatriation of Asylum Seekers: Is the Legal Norm of Non-refoulement 'Dead'?

With the approach of the '1995 deadline'<sup>1</sup> for the closure of the region's refugee camps, agreed upon by the Steering Committee of the International Conference on Indochinese Refugees<sup>2</sup> in Geneva on 14 February 1994, it is evident that countries in the region are 'gearing up' for an intensification of mandatory repatriation schemes. Hong Kong seems to have taken a leadership role in this respect, having instituted in 1991 the so-called 'Orderly Return Programme.' Nor is it an exclusively regional phenomenon. There is little doubt that in a world exhibiting 'compassion fatigue' and hardening attitudes towards asylum seekers, repatriation is a 'favoured solution' for refugees.<sup>3</sup> Does it follow that the

<sup>54</sup> The extent to which publicly funded tertiary institutions might be considered 'public authorities' has not been tested under the provisions of the Hong Kong Bill of Rights Ordinance. See in particular art 22 which provides for equality of protection of the law without any discrimination.

<sup>1</sup> Hong Kong has its own additional deadline of 1997, given the PRC's unequivocal position that it did not wish to 'inherit' any of the boat people upon resumption of sovereignty over the territory.

<sup>2</sup> Consisting of delegates from thirty countries of both first asylum and resettlement.

<sup>3</sup> As suggested by the US State Department Representative to the Geneva Conference — in an attempt to explain the American change in policy to force people back to Vietnam after they were screened out — there has been a 'progression in world policy on dealing with asylum seekers.' Cited in S McKenzie, 'Viets Must Go by 1995 UN Meeting Declares,' South China Morning Post, 15 February 1994.

internationally binding proscription of non-refoulement has been replaced with a new international norm? Can it be assumed that new defences/excuses are now available for deviations from the existing norm? This article attempts to explore the international legal/normative implications of what may be said to have become a general trend in refugee policies in recent years. It also addresses the question of whether Hong Kong has breached its respective duties under the applicable international law.

### Non-refoulement: a customary international norm

Few observers would dispute that non-refoulement is the 'cornerstone'<sup>4</sup> of international refugee law, underpinning the obligation assumed by the international community to ensure the protection of people fleeing their country because of persecution or other forms of human rights deprivation from which their government cannot or will not protect them. In its most restrictive interpretation, non-refoulement enjoins states from 'expell[ing] or return[ing] ("refouler") a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'<sup>5</sup>

The prohibition is, however, more broadly construed to include 'no rejection at the frontiers' where the end result would be the same (ie compulsory return to the country where the refugee may be subjected to persecution).<sup>6</sup> It is further considered that, as a 'logical and necessary corollary' of an otherwise incomplete regime of non-refoulement, a duty to provide temporary refuge is also implied.<sup>7</sup> Non-refoulement is moreover a preemptory rule, derogation from which is restricted to cases involving a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'<sup>8</sup>

<sup>4</sup> P Weis, 'The Development of Refugee Law' (1982) *Michigan Yearbook of International Legal Studies* 31.

<sup>5</sup> Art 33(1), 1951 UN Convention Relating to the Status of Refugees, 189 UNTS 137 (the 1951 'Refugee Convention').

<sup>6</sup> Note commentary by A Grahl-Madsen, *Territorial Asylum* (Stockholm: Almqvist & Siksell, 1980) at p 74 that the rule of non-refoulement as ordinarily formulated in art 33 did incorporate such a prohibition, in particular with regard to states sharing a common frontier with the country from which the refugees have fled. In Grahl-Madsen's opinion subsequent developments have simply served the function of clarifying the provision in question. It should be pointed out that art II of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 'OAU Convention') expressly stipulates that '[n]o person shall be subjected by a member State to measures such as rejection at the frontier, return or expulsion which would compel him to return to or to remain in a territory where his life, physical integrity or liberty would be threatened.'

<sup>7</sup> See G S Goodwin-Gill, 'Entry and Exclusion of Refugees' (1982) *Michigan Yearbook of International Legal Studies* 306.

<sup>8</sup> Art 33(2), 1951 Refugee Convention (note 5 above). Note that under the 1969 American Convention on Human Rights the principle is unqualified; thus, it protects all persons from forceful return, including those who fall under the exclusion provisions in the 1951 Refugee Convention, whether or not they can be considered as a danger to the security of the country in which they find themselves.

Notwithstanding some uncertainty surrounding the [extra]territorial scope of the obligation, its all-embracing 'personal' impact has been widely claimed. Arguably, its application is 'independent of any formal determination of refugee status by a state or an international organisation. ... [It] is applicable as soon as certain objective conditions occur.'<sup>9</sup> Indeed, non-refoulement has been extended to cover persons who do not necessarily meet 'Convention refugee criteria.'

Notably, under the 1967 Declaration on Territorial Asylum, the protection against rejection at the frontier, expulsion, or compulsory return to the oppressing state is afforded to any person who invokes the right to seek and enjoy asylum from persecution. The UNHCR has reaffirmed the application of the principle to all persons within its extended competence,<sup>10</sup> including not only those in fear of persecution but 'displaced persons' fleeing civil strife.<sup>11</sup> Regional agreements<sup>12</sup> and municipal laws have also extended the non-refoulement obligation beyond the requirements of the Refugee Convention and Protocol. Recognition has been given to a wider cluster of persons compelled to flee their countries because of acts of external aggression, events seriously disturbing public order, generalised violence, internal conflicts, or massive violations of human rights to whom the duty of non-refoulement is owed. The European-created category of 'B-status' or 'de-facto' refugees<sup>13</sup> and the special programmes devised by countries such as Australia,<sup>14</sup> Canada,<sup>15</sup> UK,<sup>16</sup> and the US<sup>17</sup> further attest to the willingness of states to enlarge the protective scope of non-refoulement.

<sup>9</sup> G Goodwin-Gill, 'Non-refoulement and the New Asylum-Seekers' (1986) 26 *Virginia Journal of International Law* 897, 902 and references cited therein. See also UNHCR Report, UN Doc E/1985/62 (1985), paras 22–3, stating that non-refoulement 'should be acknowledged and observed as a rule of jus cogens even absent a finding that a person is a convention refugee.' Similarly, it is argued that asylum-seekers awaiting status determination are 'de-facto refugees' and as such should be treated like 'Convention refugees' for the purpose of application of non-refoulement. See A C Borchers, 'First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?' (1992) 24 *NYU Journal of International Law and Politics* 1253, 1278.

<sup>10</sup> The mandate of the UNHCR has expanded considerably over time as a result of actual practice of the UNHCR. See G S Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983), pp 5–12.

<sup>11</sup> See GA Res 39/106 of 14 December 1984 (pertaining to 'displaced persons' in Chad). Note that since 1982 General Assembly resolutions refer to 'asylum seekers in situations of large-scale influx,' eg, Res 37/195 of 18 December 1982.

<sup>12</sup> See, eg, the 1969 OAU Convention (note 6 above); 1984 Cartagena Declaration.

<sup>13</sup> See Council of Europe, Parliamentary Assembly Recommendation 773 of 26 January 1976 and Committee of Ministers Recommendation R(84)1 of 25 January 1985 — calling upon states not to deport 1951 Refugee Convention refugees as well as other de facto refugees to places where they were threatened with persecution.

<sup>14</sup> Special permits to stay are granted on 'strong compassionate and humanitarian grounds.' See J M Diller, *In Search of Asylum: Vietnamese Boat People in Hong Kong* (Washington, DC: Indochina Resource Action Centre, 1988) at pp 75–7 [the 'IRAC Report']

<sup>15</sup> 'Designated classes and special measures programmes' — see *ibid.*

<sup>16</sup> 'Exceptional admissions' — see *ibid.*

<sup>17</sup> 'Temporary protected status' under the US Immigration Act 1990 — accorded to aliens physically present in the US who, if returned to their home countries, would be imperiled by armed conflict, natural disaster, or other extraordinary conditions in that country.

Yet, while interpretations of non-refoulement may vary, there is ample evidence that the principle forms part of customary or general international law, binding on all members of the international community whether or not they are parties to conventions governing the treatment of refugees.<sup>18</sup> First codified in the 'Magna Carta of refugee rights'<sup>19</sup> — the 1951 Convention Relating to the Status of Refugees non-refoulement has been incorporated in various international legal instruments, including the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It has been affirmed and re-affirmed in numerous declarations in different international fora, in successive resolutions of the UN General Assembly and the Executive Committee of the UNHCR as well as in the laws and practices of states. Indeed, it is contended that not only has the principle crystallised into a customary norm of international law but it has risen to the level of *jus cogens*.<sup>20</sup>

### Deviating state practices

The universal recognition and acceptance of non-refoulement notwithstanding, apparent transgressions from the rule have invariably been recorded. Most memorable perhaps are the Thai 'push-back' policies of the late 1970s and again in 1988,<sup>21</sup> the towing of boats out to sea by the Malaysian authorities in 1989–90,<sup>22</sup> the 1991 coerced return of Albanians by Italy,<sup>23</sup> the forceful denial of entrance to Iraqi Kurds by Turkey,<sup>24</sup> and the swift rejection of Haitians trying to land on US shores.<sup>25</sup>

<sup>18</sup> For an analysis of the status of non-refoulement as a principle of customary international law, see Goodwin-Gill (note 10 above) at pp 97–100; P Hyndman, 'An Appraisal of the Development of the Protection Afforded to Refugees Under International Law' (1981) 1 *Lawasia* 229; P Hyndman, 'Asylum and Non-Refoulement — Are These Obligations Owed to Refugees Under International Law?' (1982) 55 *Philippines Law Journal* 43; R Mushkat, 'Human Rights Under Temporary Refuge' (1984) 62 *Revue de Droit International* 169.

<sup>19</sup> There were earlier references to an obligation against refoulement in the 1933 Convention Relating to the International Status of Refugees and the 1936 Provisional Arrangement Concerning the Status of Refugees Coming from Germany but the nearly-universal acceptance of the 1951 Refugee Convention (by more than 110 countries) renders it a more significant founding source.

<sup>20</sup> Defined as 'a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' in Vienna Convention on the Law of Treaties, art 53. See 1988 Report of the UNHCR, UN GAOR, 43rd Sess, Supp No 12, at 6 UN Doc A/43/12 (1988). For the view that '[d]ue to its repeated reaffirmation at universal, regional, and national levels, the principle of non-refoulement has now become characterized as a peremptory norm (*jus cogens*) for this hemisphere' — see K Parker, 'The Rights of Refugees Under International Humanitarian Law' in V P Nanda (ed), *Refugee Law and Policy: International and US Responses* (Greenwood Press, 1989), p 33, 17n.

<sup>21</sup> See US Department of State Bureau for Refugee Programs, *World Refugee Report* (1989), p 31.

<sup>22</sup> See IRAC Report (note 14 above), p 14.

<sup>23</sup> See US Committee for Refugees, *World Refugee Survey* (1992), 76.

<sup>24</sup> *Ibid*, p 82.

<sup>25</sup> See M F Nevans, 'The Repatriation of the Haitian Boat People: Its Legal Justification Under the Interdiction Agreement Between the United States and Haiti' (1991) 5 *Temple International & Comparative Law Journal* 273, 285.

Rigid admission policies<sup>26</sup> and exclusionary tactics, or what have been referred to as 'non-entree practices'<sup>27</sup> — such as strict visa requirements, carrier sanctions, tightened border controls, and 'safe country' listings — are also cited as undermining the principle of non-refoulement.<sup>28</sup>

By the same token, on no occasion have governments denied the binding nature of the principle of non-refoulement. Rather, they have been at pains to justify measures adopted, highlight the inapplicability of the rule to the specific circumstances, or, alternatively, claim adherence to it. Thus, 'push-back' practices were defended as general protective mechanisms against foreign illegal intruders (eg fishermen) into territorial waters<sup>29</sup> or as a mere 'redirection of passengers to other countries that could help them to reach their desired place of final destination.'<sup>30</sup> Interpretations of non-refoulement obligation as extending only to those physically or legally present in the territory and not covering 'screened-out' asylum-seekers served to vindicate interdictions at sea<sup>31</sup> and mandatory repatriation.<sup>32</sup> An equally narrow construction of the principle underscored contentions that providing some form of 'humanitarian aid' constituted a compliance with the duty of non-refoulement.<sup>33</sup>

In a similar vein, restrictive immigration practices — while 'devastating for refugees' and inconsistent with the 'human rights context' in which refugee law is embedded<sup>34</sup> — are not perceived by national authorities as derogations from

<sup>26</sup> Examples in the Asia-Pacific region include the introduction by Australia of tough new regulations for refugee applicants: 'Australia Gets Tough on China Refugees,' South China Morning Post, 14 August 1991; the employment by Malaysia of harsh screening procedures (in which 75% of boat people who fled from Vietnam were judged to be non-refugees): 'Malaysia Reveals Refugee Protests,' South China Morning Post, 12 February 1991; Philippines' refusal of entry to Vietnamese boat people rescued by foreign ships unless firm guarantees were provided that they would be resettled within a certain period of time: 'Manila Refuses Entry to 101 Boat People,' South China Morning Post, 6 June 1990.

<sup>27</sup> See J Hathaway, 'The Emerging Policies of Non-Entree' (1992) 91 Refugees 41.

<sup>28</sup> For a critical examination of 'migration-hampering policies' as 'violat[ing] the most basic rationale for the 1951 Convention Relating to the Status of Refugees' see J Hathaway, 'Harmonizing For Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration' (1993) 26 Cornell International Law Journal 719.

<sup>29</sup> See 'Mahathir Warns of Forced Repatriation Soon,' South China Morning Post, 16 October 1989.

<sup>30</sup> See A Boyd, 'Asia Boat People on Cruise to Nowhere,' South China Morning Post 27 Apr 1990, p 17.

<sup>31</sup> See, eg, argument put forward on behalf of the US government that art 33 of the Refugee Convention applied only to refugees who have entered the territory of a Contracting State: Brief for Appellees, *Haitian Centers Council v McNary* 969 F 2d 1350 (2nd Cir 1992) (No 92-6144), cited in RL Newmark, 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 Washington University Law Quarterly 851, 851, 108n.

<sup>32</sup> See statement by Hong Kong's Secretary for Security: 'we are fully supported by Her Majesty's Government who see the return of non-refugees to their country of origin as being in the same category as the deportation of illegal immigrants anywhere else in the world.' HK Legislative Council ['LegCo'] Proceedings, 29 November 1989, p 495. The government also emphasised the assurances of non-persecution provided by the Vietnamese authorities as well as the arrangements made for monitoring and reintegration assistance: LegCo Proceedings, 17 January 1990.

<sup>33</sup> See, eg, the position advanced by Malaysia that it did in fact offer 'first asylum' by supplying the asylum-seekers with food, fuel, medicine, and, when necessary, new vessels for onward journey: 'Malaysia Denies Boat People Turned Away,' South China Morning Post, 28 June 1990. See also Turkey's decision not to admit the Kurds but instead to provide 'humanitarian aid' at the border: World Refugee Survey (note 23 above), p 82.

<sup>34</sup> See Hathaway (note 28 above), 723ff.

the norm of non-refoulement. Propelled by domestic xenophobic, protectionist, and racist pressures or short-sighted foreign policy objectives<sup>35</sup> (and [mis]characterising the issue as one of immigration law and policy), governments have asserted a sovereign right/duty to regulate and prevent the entry of illegal aliens and safeguard the nation's security by what are technically permissible means. Although clearly not a legitimate justification, practical difficulties coupled with frustration over the slow pace of resettlement have also affected the willingness of recipient countries to respond positively to the plight of asylum-seekers.

At the same time, states have re-affirmed their recognition of the binding effect of non-refoulement by denouncing breaches of the norm. Such condemnations followed Thai and Malaysian 'push-back' practices,<sup>36</sup> Hong Kong's repatriation of 51 asylum-seekers in 1989,<sup>37</sup> Turkey's treatment of Kurdish refugees,<sup>38</sup> and Italy's refoulement of Albanians.<sup>39</sup> The American policy of interdiction and summary return of Haitians has also elicited severe international and domestic criticisms, inducing the US government to revoke its policy (and to allow determination processes to take place outside Haiti).<sup>40</sup>

### Recent norm-creating developments

The pursuit of 'durable solutions' to the the mass influxes of refugees and displaced persons has generated several (regional) 'Declarations and Plans of Action'<sup>41</sup> giving formal expression to 'mutually re-enforcing humanitarian undertakings'<sup>42</sup> and laying down 'fundamental principles'<sup>43</sup> that pertain to the treatment and protection of asylum seekers. Given their wide sponsorship and endorsement, these agreements constitute authoritative sources of evolving international refugee norms and ought, therefore, to be resorted to in order to

<sup>35</sup> Note also the view that 'resistance to asylum-seekers under current circumstances ... reflects at least in part a deeply felt and widely shared sense among the public that immigration into a country should be subject to a measure of deliberate control.' D Á Martin, 'Interdiction, Intervention, and the New Frontiers of Refugee Law and Policy' (1993) 33 *Virginia Journal of International Law* 473, 475.

<sup>36</sup> See World Refugee Survey (note 23 above), p 65; 'US Criticizes Malaysia for Viet Policy,' *South China Morning Post*, 19 August 1990.

<sup>37</sup> See P Bowring & E Lau, 'Furore Over Forced Repatriation of Viets' *Far Eastern Economic Review*, 21 December 1989, pp 13–14.

<sup>38</sup> See World Refugee Survey (note 23 above), p 82.

<sup>39</sup> See *ibid.*, p 76.

<sup>40</sup> See 'US Policy on Asylum Reversed,' *South China Morning Post*, 9 May 1994.

<sup>41</sup> Eg, 'Declaration and Programme of Action' adopted by the Second International Conference on Assistance to Refugees in Africa (Geneva, 1984); 'Declaration and Plan of Action' adopted by the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (Oslo, 1988); 'Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons' adopted by the International Conference on Central American Refugees (Guatemala City, 1989) ['CIREFCA']; 'Declaration and Comprehensive Plan of Action' adopted by the International Conference on Indo-Chinese Refugees (Geneva, 1989) ['CPA'].

<sup>42</sup> See para 15, 'Declaration,' CPA (note 41 above).

<sup>43</sup> See arts 13–16, 'Plan of Action,' CIREFCA (note 41 above).

ascertain whether the established rule of non-refoulement has lost its normative/customary status in general international law.

Critical observers may lament the absence of an explicit<sup>44</sup> reference to non-refoulement in the 1989 Comprehensive Plan of Action adopted by the International Conference on Indo-Chinese Refugees (the 'CPA').<sup>45</sup> Yet, the application of the principle is unequivocally reflected in the commitment to give all asylum seekers ('regardless of their mode of arrival') 'temporary refuge' and 'full access to the refugee status-determination process.'<sup>46</sup> A proper and fair determination<sup>47</sup> as 'non-refugees' is also a prerequisite for any envisaged repatriation. Furthermore, the return of 'persons determined not to be refugees' to their country of origin must be 'voluntary' and conducted 'in accordance with international practices.'<sup>48</sup> 'Voluntariness' in turn has been interpreted and elaborated in numerous international fora as presupposing the 'freely expressed wishes of the refugees themselves,'<sup>49</sup> 'based on full information and freedom from constraint.'<sup>50</sup> It also presupposes the 'elimination or at least the substantial removal of the cause of fear or danger that had led to the departure of refugees from their home country' as well as the 'willingness of the country of origin to readmit its nationals and to cooperate with the country of asylum in arranging for their safe return.'<sup>51</sup> Needless to say, the use of force in carrying out a repatriation is inconsistent with the required voluntary nature of the process and is unlikely to be regarded as internationally 'acceptable.'

Nor should the allusion in the CPA to 'alternatives recognised as acceptable under international practices'<sup>52</sup> be construed to imply the sanctioning of refoulement measures, particularly in the light of disapprovals by the international community of apparent transgressions from the norm.<sup>53</sup> This is not to suggest that the principle would invariably be interpreted correctly by governments or that attempts would not be made to circumscribe its application, but, arguably, the normative strictures of non-refoulement have not yet been cast off.

<sup>44</sup> But see para 4, 'Declaration,' CPA (note 41 above) for a general recall of the 1951 Refugee Convention and its 1967 Protocol which incorporate the obligation of non-refoulement.

<sup>45</sup> But see art 14, 'Plan of Action,' CIREFCA (note 41 above): '14. The affected States reiterate their commitment to the fundamental principles of human rights and protection of refugees, especially those of non-refoulement and abstention from discrimination, expulsion or detention of refugees for having entered illegally the territory of the country.'

<sup>46</sup> CPA (note 41 above), art 5.

<sup>47</sup> As prescribed under *ibid*, art 6.

<sup>48</sup> See *ibid*, art 12.

<sup>49</sup> See, eg, UNHCR, Note on International Protection, UN Doc A/AC 96/694, 3 August 1987, para 50.

<sup>50</sup> *Ibid*, para 51.

<sup>51</sup> UNHCR, Note on International Protection, UN Doc A/AC 96/660, 23 July 1985, para 30.

<sup>52</sup> Under CPA (note 41 above), art 14, '[i]f, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined ...'

<sup>53</sup> It may be noted that in a recent meeting in Geneva convened by the UNHCR, members of the Steering Committee of the International Conference on Indochinese Refugees, while displaying a determined posture to 'expedite the return of all non-refugees from camps in the region,' refrained from endorsing mandatory repatriations. For the statement adopted by the conference see S McKenzie, 'Viets Must Go by 1995, UN Meeting Declares,' South China Morning Post, 15 February 1994.

## A new customary norm of international law?

It is a trite point that one of the shortcomings of the 'customary' mode of international law-making is the difficulty of ascertaining when a departure from custom is a violation and when it is a beginning of a new custom. Certain 'guiding'<sup>54</sup> dicta, however, have been offered by the International Court of Justice in its notable Nicaragua<sup>55</sup> decision. More specifically, the court did 'not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.'<sup>56</sup> Rather, it is sufficient that 'the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.'<sup>57</sup>

Deploying the World Court's reasoning in respect of the non-refoulement rule, it is evident that states have not justified deviating practices by reference to 'a novel right or an unprecedented exception to the principle'<sup>58</sup> or elevated political exigencies<sup>59</sup> to a 'legal level'<sup>60</sup> (by alleging the exercise of a new right of refoulement or non-entree). Indeed, as noted earlier, the extent to which states have proceeded to excuse policies adopted may reinforce the validity and endurance of the non-refoulement prohibition.

Leaving aside the exacting requirements of displacing a peremptory norm of international law, a fair assessment of whether the rule of non-refoulement has been 'modified' should also pay regard to manifestations of negative responses to derogations from it<sup>61</sup> on the one hand as well as to displays of 'generosity'<sup>62</sup> on the other. Finally, notwithstanding an imperfect 'fit' with current political realities or climate — as reflected in the varying degrees of commitment to the non-refoulement obligation — given the importance of the norm being examined, one may be inclined to follow the ICJ's approach in attributing

<sup>54</sup> The court's contribution to the understanding of the formation and role of custom in international law has been questioned by several commentators. See, eg, H C M Charlesworth, 'Customary International Law and the Nicaragua Case' (1991) 11 Australian Year Book of International Law 1; A D'Amato, 'Trashing Customary International Law' (1987) 81 American Journal of International Law 101.

<sup>55</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) [1986] ICJ Reports 14.

<sup>56</sup> Ibid, p 98, para 186.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid, p 109, para 207.

<sup>59</sup> Eg, 'reasons connected with domestic policies ideology or the direction of foreign policy': ibid, p 109, para 207.

<sup>60</sup> Ibid, p 109, para 208.

<sup>61</sup> See notes 33–7 above.

<sup>62</sup> See notes 10–14 above.



greater weight to the consistent reaffirmation by states of the principle in institutional public fora than to incidents of expedient action.

### Has Hong Kong breached its duty of non-refoulement?<sup>63</sup>

Consistent with international perceptions of non-refoulement, the Hong Kong government has not denied the validity of such a norm under international law, nor has it claimed any particular modifications to it. Rather, the government has emphasised the inapplicability of the proscription to the specific category of 'screened-out'/'economical migrants' who (it is contended) face no danger to their lives and freedom upon their return to Vietnam.

Yet, as noted elsewhere,<sup>64</sup> the Hong Kong policy exhibits several flaws. Most notably, it is premised on a status determination process the fairness and reliability of which have been doubted.<sup>65</sup>

Further, it is arguable that, given the 'strict liability' nature of non-refoulement,<sup>66</sup> the responsibility of the Hong Kong government is engaged regardless of the absence of 'direct fault' since inadequate guarantees for safe return are in place, as mandated under 'acceptable international practice.'<sup>67</sup> Vietnam has not revoked its laws against unauthorised departure and has signed no published international agreements for the withholding of punishment from involuntary, as distinct from voluntary, returnees. Questions have also been raised with respect to compliance of the provincial authorities with any assurances which might have been given by the central government of Vietnam.<sup>68</sup> Moreover, no effective system for monitoring returnees over a period of time has been established.<sup>69</sup> In general, concerns over the safety of returnees will linger as long as human rights continue to be abused in Vietnam,<sup>70</sup> dissent is suppressed, and people caught trying to leave are harshly

<sup>63</sup> For a discussion of the application to Hong Kong of non-refoulement as a rule of customary international law see R Mushkat, 'Balancing Western Legal concepts, Asian Attitudes and Practical Difficulties — A Critical Examination of Hong Kong's Response to the Refugee Problem' (1993) *Asian Yearbook of International Law* 45, 96ff.

<sup>64</sup> R Mushkat, 'Implementation of the CPA in Hong Kong: Does it Measure Up to International Standards?' (1993) 5 *International Journal of Refugee Law* 559, 574ff.

<sup>65</sup> See Lawyers Committee for Human Rights, *Hong Kong Refugee Status Review Board: Problems in Status Determination for Vietnamese Asylum Seekers* (New York: Lawyers Committee for Human Rights, 1992). For a judicial pronouncement of procedural irregularities in the screening process, see *R v Director of Immigration and Refugee Status Review Board, ex parte Do Giau* (1990) HCt, MP No 570 of 1990. The screening process has also been said to fail to identify persons who are likely to be at risk of human rights violations if returned to Vietnam (eg, members of the minority group Nung): see F Macmahon and S Furlong, 'Fears for Repatriated Minority,' *South China Morning Post*, 5 August 1992.

<sup>66</sup> See Goodwin-Gill (note 9 above), 902.

<sup>67</sup> See CPA (note 41 above).

<sup>68</sup> See A Boyd and F Macmahon, 'Returnees Face Viet Retaliation,' *South China Morning Post*, 23 October 1991 (reporting on plans by Haiphong officials to punish 'doublebackers').

<sup>69</sup> The practical difficulties of effective monitoring are immense in view of the large numbers of people involved, situated in scattered villages in rough terrain with rudimentary communications.

<sup>70</sup> See F Macmahon, 'Human Rights Abuses Continue in Vietnam' *South China Morning Post*, 21 February 1990. (citing Amnesty International's report on 'Vietnam: "Renovation" (Doi Moi) the Law and Human Rights in the 1980s').

treated (facing detention without trial in re-education camps from between six months to two years).<sup>71</sup>

It is particularly evident that the 'circumstances in connection with which [asylum-seekers have been recognised as "refugees"] have [not] ceased to exist'<sup>72</sup> and hence the Hong Kong government may not be justified in revoking refugee status granted to enable subsequent repatriation.<sup>73</sup> Indeed, the refusal of the Vietnamese authorities to readmit such returnees<sup>74</sup> belies any notion of 'changed circumstances' which should induce a refugee to 'avail himself of the protection of the country' from which he escaped.

Whether or not the Hong Kong government formally incurs liability for breach of non-refoulement, the repatriation of asylum-seekers — who have languished for several years in refugee camps — to a country which they fled at a great risk to their lives, falls short of 'elementary considerations of humanity,' regarded by the International Court of Justice as part of 'general and well recognised principles' in which international obligations may be grounded.<sup>75</sup>

Roda Mushkat\*

## A Single Guiding Rule for Damages Awards in the Presence of Collateral Benefits

### Introduction

When damages are awarded in cases of tortious conduct causing personal injury, collateral receipts<sup>1</sup> by plaintiffs are only sometimes taken into account

<sup>71</sup> See Amnesty International, *Hong Kong Protection of Vietnamese Asylum Seekers: Developments Since December 1989* (mimeographed, 11 July 1990), pp 11–12: 'some asylum seekers, if returned to Vietnam, could face possible detention as prisoners of conscience, including those who were formerly re-education detainees or who served in the administration of the former South Vietnamese Government, as well as people whose religious, literary or other activities are unacceptable to the Viet Nam Government.'

<sup>72</sup> Under a so-called 'cessation clause' in the 1951 Refugee Convention (art 1C), the Convention shall cease to apply to any person who 'can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.'

<sup>73</sup> It was reported that resort to the 'cessation clause' had been contemplated by the Hong Kong authorities in relation to 'hardcore/long stayers' who have been denied asylum overseas because of drug additions or criminal records. See R Mathewson, 'Loophole May Reject Refugees,' *South China Morning Post*, 3 July 1994.

<sup>74</sup> See S McKenzie, 'Hanoi Blocks Refugee Return,' *South China Morning Post*, 8 July 1994.

<sup>75</sup> See *Corfu Channel case* [1949] ICJ Reports 4, 22.

\* Reader, Department of Law, University of Hong Kong.

<sup>1</sup> *Halsbury's Laws of England* (3rd ed) p 293, states: 'Matters which are collateral (q) or res inter alios actae cannot be raised. Thus the extent of the defendant's liability is not affected by the fact that in consequence of his conduct a sum of money is paid to the plaintiff under a policy of insurance...' Note (q) states 'subsequent transaction relied on in mitigation must arise out of transactions naturally attributable to the breach and not be of an independent character.'